

Baptist Hospital of East Tennessee and Office and Professional Employees International Union, Local 179. Case 10–CA–33684

September 30, 2002

ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The Respondent's Motion for Summary Judgment is denied on the ground that it raises genuine issues of material fact, which would better be resolved after a hearing before an administrative law judge.¹

MEMBER BARTLETT, concurring.

I join in denying the Respondent's Motion for Summary Judgment. I agree that the pleadings raise genuine issues of material fact that warrant a hearing. However, I agree with my dissenting colleague that 8(a)(5) allegations of the type raised in this case¹ present issues of contract interpretation that Congress and the Supreme Court have indicated are meant primarily for resolution through the parties' own agreed-upon dispute resolution procedures, i.e., contractual grievance and arbitration systems, or, in the absence of applicable procedures for arbitrable resolution, Section 301 of the Act.² Thus, in my view, the Board should sua sponte stay its hand and defer further processing of such allegations until after the parties have exhausted the possibility of resolving their contractual dispute through these alternative dispute resolution procedures.

Although this approach would expand the Board's current deferral policies, it is entirely consistent with the stated purposes of those policies.³ It is also consistent

with the General Counsel's current deferral policy with respect to so-called "collection cases," which concern allegations that an employer has failed to make contractually-required contributions to benefit funds.⁴ Finally, such an expanded deferral policy would better effectuate the statutory scheme by utilizing the greater expertise and discretionary authority of arbitrators and courts to interpret collective-bargaining agreements and fashion appropriate remedies for their breach, and by preserving the limited resources of the Board for unfair labor practice issues over which it has exclusive jurisdiction.

In fact, it is hard to imagine a case better suited for resolution in grievance and arbitration or in a judicial contract enforcement action. The parties' pleadings before us frame an issue that turns on application and interpretation of detailed contract provisions, which must be evaluated in the context of past practices. This type of claim is "grist in the mill of arbitrators." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960). It bears little relation to issues at the heart of the Act, which the Board itself must decide.

MEMBER COWEN, dissenting.

Contrary to my colleagues, I would grant the Respondent's Motion for Summary Judgment on the ground that the issues presented in this case are merely matters of contract interpretation and enforcement that are best left to the parties' dispute resolution procedures. The issues in this case are based on the interpretation and application of the management rights and earned time scheduling provisions of the collective-bargaining agreement. In my view, the Board should not be involved in such questions, and the parties should be left to resolve their dispute through traditional contract enforcement mechanisms. See *United Telephone Co. of the West*, 112 NLRB 779, 782 (1955) ("The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms."). Thus, for the reasons I have stated elsewhere (see, e.g., *Scapino Steel Erectors, Inc.*, 337 NLRB 992 (2002) (Member Cowen, dissenting)), I would grant the Respondent's Motion and dismiss the complaint.

¹ The Respondent has also filed with the Board a motion for continuance. Members Liebman and Bartlett find that this motion properly should have been filed with the administrative law judge. See Secs. 102.16 and 102.24 of the Board's Rules and Regulations. In any event, our denial of the Respondent's Motion for Summary Judgment has rendered moot the Respondent's motion for a continuance.

² The complaint alleges that the Respondent unilaterally changed its earned time policy as applied to the inpatient radiology unit by assigning employees to holiday work schedules without regard to employee preference or seniority. The complaint alleges that this unilateral change was contrary to the terms of the parties' collective-bargaining agreement, and therefore violated Sec. 8(a)(5) and (1) and Sec. 8(d) of the Act.

³ See *NLRB v. Strong Roofing Co.*, 393 U.S. 357, 361 fn. 5 (1961) (citing H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41–42).

⁴ See *Spielberg Mfg.*, 112 NLRB 1080 (1955), *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), and *Collyer Insulated Wire*, 192 NLRB 837 (1971). See also *IBEW Local 13 (Collier Electric)*, 296 NLRB 1095 (1989).

⁴ See GC Memorandum 95–8 (June 6, 1995), reaffirmed in GC Memorandum 02–05 (July 19, 2002), 2002 WL 1730517.